

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL CU,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46568

FILED

JUN 30 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On April 10, 2000, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit kidnapping, one count of first degree kidnapping with the use of a deadly weapon, one count of first degree murder with the use of a deadly weapon, one count of conspiracy to commit robbery, and one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve a total of four consecutive terms of life in the Nevada State Prison with the possibility of parole and definite terms totaling 70 to 312 months. This court affirmed the judgment of conviction on direct appeal.¹ The remittitur issued on June 19, 2001.

¹Cu v. State, Docket No. 35927 (Order of Affirmance, May 22, 2001).

On September 15, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 13, 2006, the district court summarily denied appellant's petition, and on January 30, 2006, the district court entered specific findings of fact and conclusions of law. This appeal followed.

Appellant filed his petition more than four years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.³

In an attempt to demonstrate cause for the delay, appellant argued that he had retained Kirk Kennedy, his appellate counsel, to file a post-conviction petition, but that Mr. Kennedy told him in 2002 that he would not file a state post-conviction petition. He further claimed that he was in segregated confinement, had limited to no access to the prison law library, and did not have a copy of his counsel's files until 2005. Finally, he appeared to claim that his procedural defect should be excused because he was actually innocent.

²See NRS 34.726(1).

³See *id.*

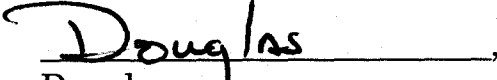
Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to overcome his procedural defect. Ineffective assistance of post-conviction counsel is not good cause in the instant case.⁴ Even assuming that appellant could excuse part of his delay because he had allegedly relied upon Mr. Kennedy to file a post-conviction petition for a writ of habeas corpus, appellant failed to demonstrate that this provided an excuse for his entire delay. According to appellant's own facts, he learned that Mr. Kennedy would not file a state post-conviction petition for a writ of habeas corpus in 2002; yet appellant waited until 2005 to file the instant petition. Appellant failed to demonstrate that his confinement interfered with his ability to file a timely petition or that the lack of files from counsel prevented him from filing a petition earlier.⁵ Finally, appellant failed to demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice because appellant failed to demonstrate that he was actually innocent.⁶


⁴See Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996).


⁵See Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

⁶See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁷ Accordingly, we ORDER the judgment of the district court AFFIRMED.⁸

 J.
Douglas

 J.
Parraguirre

 Sr. J.
Shearing

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁸We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

The Honorable Miriam Shearing, Senior Justice, participated in the decision of this matter under general orders of assignment entered January 6, 2006.

cc: Hon. Lee A. Gates, District Judge
Michael Cu
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk